

No. 15801

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United States  
Court of Appeals  
for the Ninth Circuit

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GLADYS E. LINCOLN GRAMM,

Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Last  
Will and Testament of Henry Lincoln, De-  
ceased,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Idaho,  
Southern Division.

FILED

DEC 20 1957

PAUL H. HENNINGSEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellant.

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Attorneys for Appellee.





In the District Court of the United States for the  
District of Idaho, Southern Division

Civil Action, File No. 3253

GLADYS E. LINCOLN GRAMM,

Plaintiff,

vs.

ELIZABETH LINCOLN, Executrix of the Last  
Will and Testament of Henry Lincoln, Deceased,

Defendant.

### COMPLAINT

Plaintiff complains of the defendant and for her  
cause of action alleges:

#### I.

That plaintiff is a citizen of the State of California,  
and defendant is a citizen of the State of Idaho, and  
that the matter in controversy exceeds the sum of  
Three Thousand (\$3,000.00) Dollars, exclusive of in-  
terests and costs.

#### II.

That Henry Lincoln died testate at Boise, County  
of Ada, State of Idaho, on the 27th day of August,  
1955, being at the time of his death, a resident of said  
county and state, leaving estate therein consisting en-  
tirely of personalty; That, thereafter, such proceed-  
ings were had in the Probate Court of Ada County,  
State of Idaho, on the 23rd day of September, 1955,  
that the last will and testament of the said decedent

was admitted to probate and Elizabeth Lincoln was duly appointed as executrix thereof; that she duly qualified as such executrix and letters testamentary were issued to her; and that she ever since has been and now is the duly qualified and acting executrix of the said last will and testament.

### III.

That the said Henry Lincoln, in his lifetime, became indebted to plaintiff, said indebtedness arising out of and under an agreement in writing, made and entered into the 14th day of September, 1938, while the said Henry Lincoln and plaintiff were husband and wife, at Los Angeles, California.

### IV.

That the said agreement was fully performed by plaintiff and unperformed by the said decedent who failed to pay during his lifetime, the amounts due thereunder each month, or at all. That the sum of \$25,500.00 thereunder is now due, owing, payable and unpaid, a copy of which agreement is hereto annexed as "Exhibit A," and made a part hereof.

### V.

That on or about the 7th day of February, 1956, plaintiff duly presented her duly verified creditor's claim to the said executrix before decree of distribution was made or entered in said estate of Henry Lincoln, deceased, in the said Probate Court.

### VI.

That on the 9th day of February, 1956, the said

defendant, as such executrix, rejected plaintiff's said claim, and this action is commenced within three months thereafter as required by Section 15-609 Idaho Code, requiring this action to be so commenced.

## VII.

That the said defendant, nevertheless, failed to report to the said Probate Court or to disclose to any judge thereof, the fact of the presentation of the said claim, but instead misrepresented to the court that all debts of decedent and of his said estate had been paid and discharged, and that no such creditor's claim had been presented to executrix, and on the 17th day of February, 1956, the said Probate Court therefore made, entered and recorded its decree of final distribution of the said estate of the said Henry Lincoln, deceased, of the entire estate to said defendant personally.

Wherefore, Plaintiff prays:

1. That the defendant be compelled absolutely to perform the said agreement dated September 14, 1938;
2. That, if absolute performance is not granted, judgment be entered against the defendant for the sum of Twenty Five Thousand and Five Hundred (\$25,500.00) dollars.
3. For such other and further relief as the Court may deem just and meet in the premises, and

4. For plaintiff's costs necessarily incurred in this action.

/s/ FRANK E. CHALFANT, SR.,  
Attorney for Plaintiff.

## EXHIBIT "A"

### Agreement

This Agreement, made and entered into this 14th day of September, 1938, by and between Henry Lincoln, of Los Angeles, California, hereinafter called Party of the First Part, and Gladys E. Lincoln, of Los Angeles, California, hereinafter called Party of the Second Part:

### Witnesseth:

Whereas, the parties hereto are husband and wife and unhappy differences have arisen between them; and

Whereas, the parties hereto have separated and are no longer living together, and have decided upon a complete settlement of their respective property rights and the rights of the parties to separate maintenance, alimony, attorney's fees and costs, and in and to their respective legal obligations as husband and wife, and to settle and adjust their respective property rights and relations and all claims and demands which either party now has or may in the future have upon the other; and

Now, Therefore, It Is Hereby Agreed by and between the parties hereto that in consideration of the mutual promises hereinafter contained and the premises aforesaid, said parties do hereby covenant and agree, the other with the other as follows:

One: The Party of the First Part, Henry Lincoln, the husband, hereby agrees to pay Party of the Second Part, Gladys E. Lincoln, his wife, the sum of One Hundred Twenty-five Dollars (\$125.00) per month during the rest of his natural life, payable on the 15th day of each and every month beginning on the 15th day of September, 1938. Said parties have incurred certain obligations which are now outstanding, namely: \$217.00 still due on Zephyr car, payable at the rate of \$31.00 per month, which shall be paid by the Party of the First Part payable \$93.00 on the 15th day of November, 1938, and \$31.00 each month thereafter.

Two: It is further agreed between the parties hereto that the household furniture, furnishings and goods at 12038 Texas Avenue, West Los Angeles, California, shall hereafter be the property of Party of the Second Part and the title thereto is hereby vested in the Party of the Second Part.

Three: It is further understood and agreed that there is no other community property belonging to either of the parties hereto.

Four: It is further mutually understood and agreed that the said parties hereto hereby accept the



considerations moving to each of them under this agreement as a full and complete settlement of all property rights, and each party agrees to accept as a complete settlement of all of his or her right to alimony, maintenance, attorney's fees and costs.

Five: It is further mutually understood and agreed that each party hereto does in consideration of the premises, forever release and absolve the other from all obligations and liabilities from future accounts and debts of the other and each of the parties hereto does hereby release, relinquish, quitclaim and surrender to the other all and every right as to the spouse of the other, in and to any and all present and future claims and demands of every nature on or against the other, or on or against the property of the other, and each of the said parties as the spouse of the other, does hereby release, relinquish and surrender all right, claim and demand in law, to any and all property which the other may hereafter acquire and all right to the same at the death of the other and all rights as the heir of the other, as well as the right to act as administrator or administratrix of the other by reason of the relationship of husband and wife, now existing or which may exist between them at the time of the death of the other party.

Six: It is further agreed and understood that this agreement shall not be construed as affecting the rights of either of the said parties hereto to prosecute and appear and defend in any cause of action

for divorce except insofar as this agreement settles the rights of the respective parties herein.

Seven: It is further agreed and understood that this agreement may be entered as a part of any interlocutory or final decree of divorce that may be granted either of the parties hereto.

Eight: It is mutually understood and agreed by and between the parties hereto that the said parties will, and each of them will, hereafter keep each free and harmless or indemnified from any and all debts and liabilities hereafter to be contracted, and the said Party of the Second Part does hereby covenant and agree that she will incur no indebtedness chargeable to or for which the said Party of the First Part shall become liable, and the said Party of the First Part does hereby covenant and agree that he will incur no indebtedness chargeable to or for which the said Party of the Second Part shall become liable.

Nine: It is mutually agreed by and between the parties hereto that each of them will not do or suffer to be done anything to hinder, molest or disturb the other; and the parties hereto are on honor bound not to annoy or cause any annoyance to the other by reason of their relationship as husband and wife, and from and after this day each of the parties hereto will treat the other, and it is understood to be as though they were never husband and wife.

Ten: It is mutually agreed by and between the parties hereto that all property, real, personal or mixed, hereafter acquired by the parties, and all

earnings which may be made or acquired by the parties, shall be his or her sole and separate property, respectively, free from all claims of the other; that each of the parties hereto shall have the right to dispose of her or his property, both real and personal, which either of them now has or that may be hereafter acquired by either of them, as fully and effectually as if the parties hereto were not married and had never been married and that each of the parties hereto does hereby release and relinquish to the other, and to his or her heirs, executors, administrators or assigns, all claims, demands and interest of the one against the person or estate of the other.

Eleven: That each of the parties hereto does hereby agree that they will now or in the future, execute any instrument that they are called upon to execute as husband and/or wife, to any property of any kind or description, so that the title of said property may remain in or be the property of the party owning or holding same.

Twelve: That this agreement is not made and shall not be construed as an agreement for or in aid of any divorce and that it is to remain in full force and effect whether the parties continue with the relation of husband and wife, or such relations may hereafter be dissolved for any cause whatever.

It is further understood and agreed that the parties hereto have read the covenants and conditions herein contained and have been fully advised by



counsel representing each party hereto and the acts evidenced by their signatures hereto are their own free and voluntary acts.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ HENRY LINCOLN,  
Party of the First Part.

/s/ GLADYS E. LINCOLN,  
Party of the Second Part.

Duly verified.

[Endorsed]: Filed May 5, 1956.

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[Title of District Court and Cause.]

## ANSWER

### I.

Defendant alleges in answer to paragraph III of the complaint that she is without knowledge or information sufficient to form a belief as to the truth of said allegations.

### II.

Answering paragraph IV of the complaint defendant denies that the sum of \$25,500.00 or any other sum is now due, owing, payable, or unpaid under said agreement. Defendant alleges in answer to the other allegations of said paragraph IV that she is

without knowledge or information sufficient to form a belief as to the truth of them.

### III.

Defendant denies each and every allegation, statement, and averment contained in paragraph V of the complaint.

### IV.

Answering paragraph VII of the complaint defendant admits that on the 17th day of February, 1956, the Probate Court of Ada County, State of Idaho, made, entered, and recorded its decree of final distribution of the estate of Henry Lincoln, deceased, and thereby distributed the entire residue of the estate to the defendant personally, and denies each and every other allegation, statement, and averment contained in said paragraph VII.

### V.

And defendant further alleges as a separate answer and defense that another proceeding is pending in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, wherein the plaintiff herein is seeking to recover judgment on the identical claim sued upon in the above-entitled action, to wit: Plaintiff herein, after the Probate Court of Ada County, Idaho, had denied her motion to vacate and set aside the decree of final distribution made and entered in the matter of the estate of Henry Lincoln, deceased, appeal from the said decree of final distribution to the said state district court, which appeal is now pending therein: that

the plaintiff herein is the appellant therein, and the defendant herein is the respondent therein, and the relief sought on said appeal and in the above-entitled action is the same.

## VI.

And further answering the complaint, and for a separate answer thereto defendant alleges that as executrix of the last will and testament of Henry Lincoln, deceased, she caused notice to creditors of the deceased to be duly published for four weeks beginning September 29, 1955, and ending October 20, 1955, as provided by the order of the Probate Court of Ada County, State of Idaho, and by the statutes of the State of Idaho, in such case made and provided; that the alleged claim of plaintiff was not presented to defendant within four months after the first publication of said notice, as required by said notice and the applicable law of the State of Idaho, or at all; and plaintiff did not apply to the said Probate Court for an order extending the time for presenting her alleged claim until after the decree of final distribution had been duly made and entered by the said Probate Court in the matter of said estate, and no order was made by the said Probate Court extending the time for presenting said claim; that in the circumstances in this paragraph set forth the alleged claim of plaintiff at the time she alleges in the complaint that she presented it to defendant, to wit, February 7, 1956, had no legal status as a creditor's claim and, under the applicable statutes of Idaho and the decisions of the Idaho Supreme Court

expounding and construing the same, was and is a nullity.

## VII.

That on the 17th day of February, 1956, the said Probate Court duly made and entered its order and decree allowing and settling the first and final account of the executrix of the estate of Henry Lincoln, deceased (who is the defendant herein), and making final distribution of the residue of said estate, pursuant to the petition for final distribution filed by the said executrix; that the said order and decree were and are in one instrument; that the time and place of hearing said first and final account and petition for final distribution were duly and regularly noticed by the clerk of said court as provided by law; that plaintiff did not appear in person or by attorney in opposition to the making and entry of said order and decree, or at all, or make or file any objections either orally or in writing to the said account or the petition for final distribution as provided by law or at all; that thereafter on the 16th day of March, 1956, the plaintiff moved the Probate Court "that the said Decree be vacated and set aside as void against your petitioner (plaintiff herein) in the face of the failure of the said executrix (defendant herein) to disclose filing of the said Creditor's Claim by your petitioner (plaintiff herein)," which motion, after arguments of counsel and due deliberation thereon by the Court, was by it denied and overruled on the 11th day of April, 1956.

That the said creditor's claim referred to is the identical creditor's claim which is the subject of this

action, and the parties in the said proceeding in the said Probate Court, and the parties to the above-entitled action are identical; that plaintiff in the above-entitled action was the creditor who made the motion to vacate and set aside said decree in the Probate Court, and the defendant herein was the executrix of the estate of Henry Lincoln, deceased, in said proceeding; that the said order refusing to vacate and set aside the said order and decree is now final and conclusive of plaintiff's right in the premises, and stands unreversed and unmodified and in full force and effect, and the matters and things above set forth, which were determined, adjudged, and decreed in the order refusing to vacate and set aside the said decree of the Probate Court were and are res adjudicata between the plaintiff and the defendant in this cause.

#### VIII.

The sum of \$19,000.00, part of the claim stated in the complaint, did not accrue within five years before the commencement of this action, and is therefore barred by the provisions of 5-216, Idaho Code.

#### IX.

That plaintiff's cause of action is barred by the provisions of 15-602, Idaho Code.

#### X.

That plaintiff's cause of action is barred by the provisions of 15-604, Idaho Code.

Wherefore, defendant demands judgment that plaintiff take nothing by this action, and that de-



fendant have her costs of suit in this behalf expended.

/s/ KARL PAINE,

Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed June 2, 1956.

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[Title of District Court and Cause.]

### MOTION

Comes now the defendant herein, and moves the court for an order under Rule 7(a) of Federal Rules of Civil Procedure requiring the plaintiff to reply to the answer of defendant to plaintiff's complaint on file herein on the grounds and for the reasons set forth in the affidavit of Karl Paine, marked Exhibit "A," annexed hereto, and made a part hereof.

This motion is based upon the said affidavit and the records and files in this action.

/s/ KARL PAINE,

Residing at Boise, Idaho,

Attorney for Defendant.

EXHIBIT "A"

In the District Court of the United States  
for the District of Idaho, Southern Division

GLADYS E. LINCOLN GRAMM,

Plaintiff,

vs.

ELIZABETH LINCOLN, Executrix of the Last  
Will and Testament of Henry Lincoln, De-  
ceased,

Defendant.

AFFIDAVIT

State of Idaho,  
County of Ada—ss.

Karl Paine, being duly sworn, says that a reply to the answer of defendant to plaintiff's complaint on file in the above-entitled action will do away with the necessity of a trial, and present only questions of law for decision, and in support of this allegation he avers:

I.

Plaintiff alleges in her complaint that she presented a creditor's claim to defendant as executrix of the last will and testament of Henry Lincoln, deceased, but she does not allege that she presented said claim within the time limited in the notice to creditors for the presentation of creditors' claims, or that she applied to the Probate Court for an order extending the time in which to present her alleged

claim, or that the said court made any order extending the time for presenting her alleged claim.

## II.

The answer of defendant to plaintiff's complaint denies that plaintiff presented any claim, and affirmatively alleges that at the time plaintiff lodged her alleged claim with the defendant the time limited in the notice for presenting creditors' claims had expired, and that plaintiff did not apply to the said Probate Court for an order extending the time for presenting her alleged claim, and that the said Probate Court made no order extending the time for the presentation of plaintiff's alleged claim.

## III.

And the said answer further alleges that the presentation of the alleged creditor's claim after the time limited in the notice for the presentation of claims, in the absence of an order of the court extending the time therefor, was a nullity.

## IV.

And defendant further alleges that paragraphs V, VI, and VII of her said answer are based upon the records and files of said Probate Court in the matter of the estate of Henry Lincoln, deceased, and no dispute exists between the parties, or will arise, as to the truth of them.

And further affiant saith not.

/s/ KARL PAINE.



Subscribed and sworn to before me this 20th day of August, 1956.

[Seal]      /s/ BETTY W. WRIGHT,  
Notary Public for Idaho,  
Residing at Boise, Idaho.

[Endorsed]: Filed August 20, 1956.

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[Title of District Court and Cause.]

### MINUTE ORDER SEPTEMBER 5, 1956

This cause coming on regularly this date for hearing on Motion to Compel plaintiff to reply to defendant's answer to plaintiff's Complaint, Frank Chalfant, Sr., appeared on behalf of the plaintiff and Karl Paine, Esquire, appeared for defendant.

After hearing counsel and the Court being advised, the Motion was granted and plaintiff was ordered to answer affirmative defense of defendant.

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[Title of District Court and Cause.]

### REPLY TO AFFIRMATIVE DEFENSE

With reference to the alleged affirmative defense contained in the answer filed herein, plaintiff replies in part as follows, to wit:

#### I.

That at all times herein mentioned plaintiff was a non-resident of the State of Idaho and was not

within the State of Idaho during the year 1955 nor until September 25, 1956.

## II.

That at the time alleged in the said affirmative defense did plaintiff know directly or indirectly of any notice to creditors nor the date when the period for the filing of claims against the said estate commenced or ended, but plaintiff was misled thereon by a proposed settlement as hereinafter alleged.

## III.

That on December 29, 1955, plaintiff consulted with a California attorney, Joseph Shane, regarding the matter of filing her creditor's claim in the estate of Henry Lincoln, deceased; that on said date plaintiff's said attorney communicated with the clerk of the Probate Court of Ada County, State of Idaho, inquiring about the pendency of said estate; that thereafter, about January 3, 1956, plaintiff first learned that the estate of Henry Lincoln, deceased, was being probated.

## IV.

That thereafter, on or about February 4, 1956, plaintiff did locate her copy of the property settlement agreement which is the subject matter of this action, caused the same to be photostated and appended to her creditor's claim, and on or about February 6, 1956, duly presented her creditor's claim to the defendant.

## V.

That in connection with such presentation of her

creditor's claim, plaintiff caused a letter to be written by her attorney and presented with the said claim, in which letter plaintiff stated, among other things, the following:

"I do not know when the first publication of notice to creditors was made and, consequently, I am unable to determine if this creditor's claim was filed in time. If for some reason the same should be rejected because of the time of presentation, please advise me thereof at once so that an affidavit by my client can be made and presented to the Probate Judge permitting the filing of this creditor's claim by reason of my client's non-residence in Idaho and lack of knowledge of notice to creditors. Please accept my thanks in advance for your immediate reply to the matter stated herein."

## VI.

That thereafter, under date of February 9, 1956, defendant through her attorney, Karl Paine, wrote to plaintiff's said attorney and did acknowledge the receipt of plaintiff's said creditor's claim, stating as follows:

"Reference is made to your letter of February 6, 1956, addressed to Mrs. Elizabeth Lincoln, Executrix of the Estate of Henry Lincoln, deceased, enclosing a creditor's claim against the said estate. Since you mailed the letter in my care it is hardly necessary to say that I am replying thereto as attorney for the estate.

"I note your inquiry. Disclaiming any intended discourtesy to you, either personally or professionally, I am constrained to say that I am in no position to supply the information you seek, or to aid or appear to aid you in the presentation or prosecution of this claim. On the other hand it is my present duty and earnest purpose to do all in my poor power to defeat the claim, which on its face is phony. Mrs. Lincoln has heard of "Connie," and of the bad time she gave Mr. Lincoln in the long ago, but your letter is the first information she has had of this or any other claim of your client against Mr. Lincoln.

"Do not misunderstand me. This harsh characterization of the claim is not meant to strike at you over your client's shoulders. I seek no personal quarrel with you. You may not know anything of the claim's history.

"Lastly, I note that the claim is divided into two parts, obviously because it is thought the first item may be outlawed. In my opinion it is outlawed. If your client will withdraw it, I will entertain an offer of compromise from you based on the second item. Lawsuits are costly."

That defendant's said attorney ignored the inquiry of plaintiff's attorney dated February 6, 1956, wholly failed to disclose the dates of notice to creditors or the fact that the defendant had, on February 8, 1956, filed her petition for distribution and her final account in said estate in the Probate Court of Ada County, Idaho.

## VIII.

That the plaintiff and her attorney did so rely upon the said letter of the defendant's attorney that plaintiff and her attorney were thereby induced to and did omit her right of asserting to the Probate Court her said creditor's claim; that the defendant as executrix thus acted for her own personal interest utterly and directly in conflict with her high fiduciary duty as executrix to faithfully protect the legal rights of creditors, and not to prefer or favor herself.

## IX.

That defendant is the sole and only beneficiary under the last will and testament of Henry Lincoln, deceased, and the violation of her said fiduciary relationship and trust as aforesaid did so to her personal benefit and to the detriment of plaintiff, and thus resulted in the unjust enrichment of defendant personally.

## X.

That the proceedings on appeal referred to in paragraph V of defendant's affirmative defense came on for hearing in the District Court of the Third Judicial District for Ada County, on September 26, 1956, and said court did on said date refuse proffered evidence of the creditor's claim and held in substance that the decree of distribution was affirmed, and therefore, would receive no evidence on the matters alleged in plaintiff's complaint herein or the matters raised in answer to defendant's affirmative defense herein; that an appeal from said judgment of affirmance will be prosecuted by plaintiff.



## XI.

That plaintiff has no plain, speedy or adequate remedy at law whereby her rights in the premises may be punctually enforced.

Wherefore, plaintiff prays that she have relief as prayed in her complaint for specific performance of her said property settlement agreement and for general and equitable relief herein.

/s/ FRANK E. CHALFANT, SR.,  
Attorney for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed October 12, 1956.

---

[Title of District Court and Cause.]

## MOTION FOR SUMMARY JUDGMENT

The defendant moves the court for summary judgment herein against the plaintiff and in favor of defendant on the ground, inter alia, that it appears from the pleadings

## I.

That plaintiff admits that defendant, as executrix of the estate of Henry Lincoln, deceased, duly caused notice to creditors to be published for the time and in the manner provided by law, pursuant to the Idaho law in such case made and provided and the order of the Probate Court of Ada County, State of Idaho; that the alleged creditor's claim set

forth in plaintiff's complaint was not presented to defendant within the time limited by such notice to creditors or presented at all; that plaintiff lodged with defendant said alleged creditor's claim after the time limited for the presentation of creditor's claims; that plaintiff did not apply to the said Probate Court for an order extending the time for the presentation of said alleged claim until after the decree of final distribution had been made and entered in said estate, and that said Probate Court did not make an order extending the time for the presentation of said alleged or any other creditor's claim;

Wherefore, it appears from the pleadings that the said alleged claim when lodged as aforesaid was not a creditor's claim, but under the applicable law of the State of Idaho and the decisions of the Supreme Court of Idaho said alleged creditor's claim was and is a nullity.

## II.

It further appears from the pleadings, *inter alia*, that plaintiff admits that the allegations of paragraph V of defendant's answer are true, and further admits by plaintiff's reply to the answer that the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on September 26, 1956, affirmed the order and decree appealed from, and that plaintiff intends to appeal from the order affirming the same. And defendant alleges that the time for appealing from said order last mentioned has not expired.

Wherefore, it appears from the pleadings that another proceeding is pending in the said state district court wherein plaintiff is seeking to recover judgment on the identical claim sued upon in this action.

### III.

It further appears from the pleadings, inter alia, that plaintiff admits that the allegations of paragraph VII of defendant's answer are true.

Wherefore, it appears from the pleadings that the order of the Probate Court refusing to vacate and set aside the order allowing and settling defendant's first and final account and the decree of final distribution made and entered in said estate is now final and conclusive in the premises and stands unreversed and unmodified and in full force and effect, and that no appeal lies therefrom, and that the matters and things which were determined, adjudged, and decreed in the order refusing to vacate and set aside the said order and decree of the Probate Court were and are res judicata between the plaintiff and defendant in this action.

This motion is based upon the pleadings and the records and files in the above-entitled action.

/s/ KARL PAINE,

Residing at Boise, Idaho,  
Attorney for Defendant.



NOTICE OF MOTION

To Gladys E. Lincoln Gramm, Plaintiff, and to  
Frank E. Chalfant, Sr., Attorney for Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this court in the courtroom of said court in Boise, Idaho, on the 25th day of October, 1956, at 10:00 o'clock a.m. of that day, or as soon thereafter as counsel can be heard.

/s/ KARL PAINE,  
Residing at Boise, Idaho,  
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed October 15, 1956.

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[Title of District Court and Cause.]

MOTION TO FILE A  
SUPPLEMENTAL ANSWER

Comes now the defendant herein and moves the Court for leave to file a supplemental answer herein.

This motion is based upon the records and files in this action and upon a copy of the opinion of the Supreme Court of the State of Idaho affirming the order of the state District Court referred to in defendant's answer on file herein affirming the order of the Probate Court of Ada County allowing and settling the first and final account of defendant as executrix of the estate of Henry Lincoln, deceased.

and the decree of final distribution made and entered therein, from which order of the state District Court an appeal was taken to the Idaho Supreme Court by plaintiff. A copy of said opinion of the Supreme Court is marked Exhibit "A," annexed hereto, and made a part hereof.

/s/ KARL PAINE,  
Attorney for Defendant.

[Endorsed]: Filed June 29, 1957.

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[Title of District Court and Cause.]

Civil Action 3253

### MOTION

Comes Now Plaintiff in the above-entitled action and moves the court for an order that the plaintiff may add, as an additional party in the above proceedings, Elizabeth Lincoln as an individual heir and legatee, and that the plaintiff may file the amended complaint attached hereto and by reference thereto made a part hereof.

/s/ FRANK E. CHALFANT, SR.,  
/s/ RAYMOND L. GIVENS,  
Attorneys for Plaintiff.

[Endorsed]: Filed July 23, 1957.

[Title of District Court and Cause.]

## SUPPLEMENTAL ANSWER

Comes now the defendant, by leave of court first had and obtained, and for a supplemental answer to plaintiff's complaint on file herein alleges:

### I.

That since the filing of defendant's answer herein the state District Court mentioned in paragraph V of her said answer made a final order herein affirming the decree of final distribution and the order allowing and settling the first and final account of the defendant as the executrix of the estate of Henry Lincoln, deceased, and thereupon plaintiff appealed therefrom to the Supreme Court of the State of Idaho, and on the 31st day of May, 1957, the Supreme Court affirmed the order so appealed from; that more than twenty days have elapsed since the opinion of the Supreme Court was made and filed, and the time for filing a petition for rehearing on said appeal has expired, and no petition for a rehearing therein is pending, and the remittitur to the said District Court has been duly issued by the Supreme Court and filed in the said state District Court, and the said order of the said state court is final and conclusive and in full force and effect and establishes the law of this case in all the courts of this state, state and federal.

The opinion of the Supreme Court is marked Exhibit "A," annexed hereto, and made a part hereof.

Wherefore, defendant repeats the demand in her said answer contained that plaintiff take nothing by this action, and that defendant have and recover her costs of suit herein.

/s/ KARL PAINE,

/s/ J. M. LEGGAT,

Attorneys for Defendant.

Service of copies acknowledged.

EXHIBIT "A"

In the Supreme Court of the State of Idaho

No. 8517

In the Matter of the  
Estate of Henry Lincoln, Deceased,

GLADYS E. LINCOLN GRAMM,

Petitioner-Appellant,

vs.

ELIZABETH LINCOLN, Executrix of the Will of  
Henry Lincoln, Deceased,

Respondent.

Appeal from the District Court of the Third Judicial District, Ada County. Honorable M. Oliver Koelsch, Judge.

From a judgment of the District Court affirming an order of the Probate Court refusing to set aside a settlement of final account and decree of distribution appellant appealed. Affirmed.

FRANK E. CHALFANT, SR.,

Boise, and

JOSEPH SHANE,

Los Angeles,

For Appellant.

KARL PAINE,

Boise,

For Respondent.

Keeton, C. J.

Henry Lincoln died testate August 27, 1955, leaving his widow, Elizabeth Lincoln, respondent, executrix and sole devisee and legatee. His will was admitted to probate September 23, 1955. Time for presentation of claims against the estate expired January 29, 1956. Decree was entered that due and legal notice to creditors had been given. The executrix filed her final account and petition for distribution of the estate.

On or about February 9, 1956, subsequent to the expiration of the time for presentation of claims, but before the decree of distribution was entered, appellant, a former wife of deceased, filed a claim with Karl Paine of Boise, attorney for the estate, he being the person designated in the notice to creditors with whom claims should be filed. This claim was based



on an agreement entered into between appellant and deceased, dated September 14, 1938, in which deceased agreed to pay said appellant the sum of \$125.00 a month "during the rest of his natural life, payable on the 15th day of each and every month, beginning September 15, 1938." The creditor's claim and the testimony show that none of the payments was ever made.

After the time for presentation of claims had expired, but before the decree of distribution had been entered Karl Paine, attorney for the estate, wrote a letter to appellant's attorney Shane, acknowledged receipt of the claim, in substance rejected it, but did not furnish information asked for relative to securing an extension of time in which to file the claim.

The attorney representing appellant was advised, in response to an inquiry, by the probate judge by letter dated January 3, 1956, the name of the executrix and where claims should be filed, and a claim blank furnished.

Appellant filed no objections in the probate court to the first and final account or to the petition for distribution. Decree of final distribution and settlement of final account was made and recorded. Thereafter, on March 16, 1956, appellant filed a petition with the probate court to set aside the decree of distribution on the ground that her claim had never been presented to or passed on by the probate court, nor rejected by the executrix, and no notice of rejection had ever been given, and that it was falsely

represented in the final account and petition that all the debts had been paid and discharged and that the estate was in a condition to be closed.

To this petition the executrix demurred on the ground that the facts alleged were insufficient to grant the relief prayed for and also moved to strike the petition on the ground that at the time the claim was presented the time for presenting claims had expired and no extension of time had been asked for or granted, and that no exceptions or objections were ever taken to the final account and petition for distribution as filed. Thereafter on April 5, 1956, appellant, in writing, asked for an extension of time for filing a creditor's claim on the ground that she was a nonresident of the state and had no actual notice, directly or indirectly, of the publication of notice to creditors. In her affidavit appellant states that she learned of the final burial services of deceased about December 17th and on December 29th contacted Joseph Shane, an attorney of Los Angeles, relative to the presentation of a creditor's claim against the deceased's estate.

On April 11, 1956, the probate judge sustained the demurrer to the petition and granted the motion to strike the same, and dismissed the matter with prejudice. On April 12, 1956, claimant filed notice of appeal to the district court "from the Decree of Settlement of Final Account \* \* \* of the last will and testament of Henry Lincoln, deceased" and "from the Decree Directing the Distribution made and entered the 17th day of February, 1956." No appeal

was taken from the order denying the petition to vacate the decree of final distribution.

On appeal the matter was heard by the Honorable M. Oliver Koelsch, district judge, who found that the claim was not presented to the executrix within the time limited by the notice to creditors, that no exceptions or objections, either oral or in writing, were taken in the probate court to the first and final account or to the petition for final distribution; that the only appearance by appellant in the probate court was after the decree of final distribution had been made and entered; that the proceeding in the probate court in the matter was free of error, and was regular, legal and valid in all respects and affirmed the decree of the probate judge. Appeal was taken from the judgment to this Court.

Appellant assigns as error the alleged failure of the district judge to make findings of fact and conclusions of law; in rejecting the offer in evidence of appellant's claim; that the probate judge did not require high fiduciary standards of duty applicable to representatives administering estates of deceased persons; that the claim was not rejected in writing by the executrix in the manner provided by Sec. 15-607 I.C.; that the decree of distribution did not mention or refer to appellant's claim; that the decree of distribution should not have been entered and the final account approved without a report having been made by the executrix of appellant's claim; that the executrix was guilty of bad faith in that the claim should have been reported to the probate



judge before the account was settled; that an extension of time should have been granted after the time for presentation of claims had expired to present the particular claim in question. Other assignments are covered in the ones above enumerated.

The material facts are not in dispute. Findings of fact and conclusions of law were entered in the district court. Further findings than those made were not required.

The attorney for the estate, Karl Paine, was not contacted relative to the claim until after the time for presentation of claims had expired.

Sec. 15-604 I.C. provides:

“All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever: provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.”

This section requires that claims against an estate be presented within the time and in the manner prescribed by law.

If an extension of time for filing claims is to be secured, an affidavit and showing “may be presented at any time before a decree of distribution is en-

tered." Neither the affidavit mentioned in the section, nor claim was presented in this case within the time prescribed.

Probate courts are courts of record with original jurisdiction in all matters of probate and settlement of estates of deceased persons, Idaho Const., Art. V, Sec. 21, and their orders and judgments in regard to such matters cannot be collaterally attacked and can be reviewed only by proper motion in such courts or by appeal from their decisions. *Clark vs. Rossier*, 10 Idaho 348, 78 P. 358; *Shaw vs. McDougall*, 56 Idaho 697, 58 P. 2d 463; *Penn Mutual Life Insurance vs. Beauchamp*, 57 Idaho 530, 66 P. 2d 1020.

A party claiming an interest in an estate of a deceased person cannot present his claim and establish his status as such claimant in the first instance on appeal to the district court from a decree of the probate court distributing the estate. *Estate of McVay*, 14 Idaho 64. 93 P. 31; *Shaw vs. McDougall*, *supra*.

In *Lundy vs. Lemp*, 32 Idaho 162, 179 P. 738, it was held that claims against estates of deceased persons, arising upon contracts, which are not presented to the executor or administrator within the time limited in the notice required by law to be given to creditors are barred and no action can be maintained thereon. To the same effect see *Blake vs. Lemp*, 32 Idaho 158, 179 P. 737; *Morse vs. Steele* (Cal.) 86 P. 693. For collection of authorities see 130 Am. St. Rep. 324, and 21Am. Jur. 587, Sec. 365 and 589, Sec. 366.

Under the provisions of the statute (Sec. 15-604 I.C.) a non-resident creditor desiring to present a belated claim should apply for an order before the decree of distribution is entered. *Penn Mutual Life Insurance vs. Beauchamp*, *supra*.

No issues were joined in the probate court contesting the final decree of distribution or the settlement of the final account and the district court only had jurisdiction to hear *de novo* issues framed, if any, in the probate court. *Collins vs. Lindsay*, 33 Idaho 230, 191 P. 357; Sec. 17-206 I.C.; *Shaw vs. McDougall*, *supra*.

It appears that appellant having failed to present her claim within the time limited in the notice to creditors, and having failed to apply for or secure an order extending the time before the decree of final distribution had been entered or make any objection to the said final account and the granting of the decree of distribution in the probate court, cannot for the first time in the district court or here, be heard on issues never presented before the probate court.

In appellant's brief she argues extensively that there was a fraud, either actual or constructive, committed. The fact of the matter is that she had approximately twenty-five days to present her claim after being furnished with a claims blank and other information requested, and the time for presentation of the claim and the time for application for an extension of time expired before any action was taken.

Appellant claims that facts which should have been disclosed to her were concealed by the executrix and because of this fact she suffered loss. We are unable to find from the record any such concealment, and the citations contained in appellant's brief applicable to actual or extrinsic fraud are not pertinent to the situation presented. Judgment is affirmed. Costs to respondent.

Taylor, Smith and McQuade, JJ., concur.

Porter, J., dissents.

Reported in 312 Pac 2nd.

Entered May 31, 1957.

[Endorsed]: Filed August 12, 1957.

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[Title of District Court and Cause.]

#### MINUTE ORDER AUGUST 12, 1957

This Cause came on regularly this date in open court for hearing on Plaintiffs Motion to file an Amended Complaint and Defendant's Objection to filing an Amended Complaint and Motion to file a Supplemental Answer, Frank E. Chalfant, Sr., and Raymond L. Givens, appearing as counsel for the Plaintiff and J. M. Leggat and and Karl Paine appearing as counsel for the Defendant.

After a discussion by counsel of the respective parties it was ordered that the Motion to file a Supplemental Answer be granted.

It was further ordered that at this time the court would not rule on the Motion to file an Amended Complaint and this matter was set for Pretrial hearing, Friday, August 16, 1957, at 11 a.m.

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[Title of District Court and Cause.]

Civil Action 3253

## AMENDED COMPLAINT

Plaintiff complains of the defendant and for her first cause of action alleges:

### First Cause of Action

#### I.

That plaintiff is a citizen of the State of California, and defendant is a citizen of the State of Idaho, and that the matter in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interests and costs.

#### II.

That Henry Lincoln died testate at Boise, County of Ada, State of Idaho, on the 27th day of August, 1955, being at the time of his death, a resident of said county and state, leaving estate therein consisting entirely of personality; that, thereafter, such proceedings were had in the Probate Court of Ada County, State of Idaho, on the 23rd day of September, 1955; that the last will and testament of the said decedent was admitted to probate and Eliza-



beth Lincoln was duly appointed as executrix thereof; that she duly qualified as such executrix and letters testamentary were issued to her; and that she ever since has been and now is the duly qualified and acting executrix of the said last will and testament.

### III.

That the said Henry Lincoln, in his lifetime, became indebted to plaintiff, said indebtedness arising out of and under an agreement in writing, made and entered into the 14th day of September, 1938, while the said Henry Lincoln and plaintiff were husband and wife, at Los Angeles, California.

### IV.

That the said agreement was fully performed by plaintiff and unperformed by the said decedent who failed to pay during his lifetime, the amounts due thereunder each month, or at all. That the sum of \$25,500.00 thereunder is now due, owing, payable and unpaid, a copy of which agreement is hereto annexed as "Exhibit A," and made a part hereof, and a copy of the decree of absolute divorce of plaintiff and defendant annexed as "Exhibit B," and made a part hereof.

### V.

That on or about the 7th day of February, 1956, plaintiff duly presented her duly verified creditor's claim to the said executrix before decree of distribution was made or entered in said estate of Henry Lincoln, deceased, in the said Probate Court.



## VI.

That on the 9th day of February, 1956, the said defendant, as such executrix, rejected plaintiff's said claim, and this action is commenced within three months thereafter as required by Section 15-609 Idaho Code, requiring this action to be so commenced.

## VII.

That the said defendant, nevertheless, failed to report to the said Probate Court or to disclose to any judge thereof, the fact of the presentation of the said claim, but instead misrepresented to the court that all debts of decedent and of his said estate had been paid and discharged, and that no such creditor's claim had been presented to executrix, and on the 17th day of February, 1956, the said Probate Court therefore made, entered and recorded its decree of final distribution of the said estate of the said Henry Lincoln, deceased, of the entire estate to said defendant personally.

Plaintiff complains of the defendant and for her second cause of action alleges:

## Second Cause of Action

## I.

Plaintiff hereby realleges all her allegations in her first cause of action and, in addition thereto, alleges as follows:

## II.

That the said defendant, Elizabeth Lincoln, is the sole heir and sole legatee of the said Henry

Lincoln, deceased, and that as such she claims and asserts that she is entitled to all of the residue of the estate of Henry Lincoln, deceased.

### III.

That plaintiff, Gladys E. Lincoln Gramm, is a prior wife of the said Henry Lincoln, deceased, and as such at the time of their divorce received a property settlement in the sum of \$125.00 per month for the rest of the natural life of her said husband, Henry Lincoln, by said written agreement.

### IV.

That there is now due, owing, payable and unpaid on the said property settlement agreement and decree of divorce the sum of \$25,500.00 to plaintiff herein.

### V.

That plaintiff is entitled to receive out of the estate of the said Henry Lincoln, deceased, the residue thereof in the hands of the defendant remaining in the sum of \$21,921.94, which sum was ordered by the Probate Court of Ada County, Idaho, on February 17, 1956, to be distributed to defendant contrary to equity and justice, which constitutes unjust enrichment of said defendant, Elizabeth Lincoln, in violation of the rights of this plaintiff.

### VI.

That defendant at all times prior to February 17, 1956, during her marriage to said Henry Lincoln, deceased, well knew that the said Henry Lincoln was

formerly married to plaintiff; that plaintiff and her said husband had been divorced, and that they had executed the said property settlement agreement.

## VII.

That the said defendant, in equity and good conscience, should be required to restore, pay to and set over to the plaintiff as a trust fund held by said defendant for the use and benefit of plaintiff, the said sum of \$21,921.94.

## VIII.

That the defendant is under obligation from the ties of natural justice and equity to refund to the plaintiff the sum of \$21,921.94, as an implied debt; for defendant to retain such sum of money, which she in equity and good conscience ought not to keep, is to put in jeopardy all of the rights in equity of the plaintiff, unjustly enrich defendant to the wholly and inequitable detriment of plaintiff.

Wherefore, Plaintiff prays:

1. Under her first cause of action, that the defendant be compelled absolutely to perform the said agreement dated September 14, 1938, notwithstanding the Probate Court decree and order, that judgment be entered for plaintiff and against defendant for the sum of \$25,000; and,

2. Under her second cause of action, that sum of \$21,921.94, unjustly and inequitably ordered to be distributed to defendant be impressed and impounded herein as a trust fund to be awarded to the person entitled thereto;

3. For such other and further relief as the court may deem just and meet in the premises, and for plaintiff's costs necessarily incurred in this action.

/s/ RAYMOND L. GIVENS,  
Attorney for Plaintiff.

Duly Verified.

[Exhibit A attached to the foregoing is identical to Exhibit A attached to Complaint. See pages 6 to 11.]

### EXHIBIT "B"

In the Eighth Judicial District Court of the State  
of Nevada, in and for the County of Clark

No. 7364

HENRY LINCOLN,

Plaintiff,

vs.

GLAYDS E. LINCOLN,

Defendant.

### DECREE OF DIVORCE

The above-entitled cause coming on regularly for trial before the above-entitled Court, sitting without a Jury, on the 2nd day of March, 1937, upon the complaint of the plaintiff, and the plaintiff appearing personally and through his attorneys, Messrs. Foley & Henderson; the defendant having filed her Appearance and Waiver, waiving the time for

the setting of the trial of said cause, and also waiving the Findings of Fact and Conclusions of Law; and the Court having before it all the papers, pleadings and files in said action; and being fully advised in the premises and satisfied that this action has been duly and regularly commenced, that the plaintiff has been a bona fide resident of the State of Nevada for more than six weeks prior to the commencement of said action; and that the Court has full and complete jurisdiction in the premises, both as to the subject matter and the parties hereto;

Now, after hearing the witnesses produced, sworn and testifying on behalf of the plaintiff, and all the material allegations of the complaint having been satisfactorily proved to the Court,

It Is Ordered, Adjudged and Decreed, that the bonds of matrimony now and heretofore existing between the parties hereto, Henry Lincoln, the plaintiff, and Gladys E. Lincoln, the defendant, be and the same are hereby dissolved, set aside and held for naught, and that the said plaintiff be and he is hereby decreed an absolute divorce from said defendant.

Done in open Court at Las Vegas, Nevada, this 2nd day of March, 1937.

WM. E. ORR,  
District Judge.

Lodged August 16, 1956.

Filed March 2, 1937.



[Title of District Court and Cause.]

## PRETRIAL STIPULATION

A pretrial conference having been heretofore set by this court for 11:00 o'clock a.m., August 16, 1957, and for the purpose of said pretrial conference it is hereby stipulated by and between the respective parties hereto as follows, to wit:

### I.

That plaintiff is a citizen of the State of California and defendant is a citizen of the State of Idaho; and that the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

### II.

Plaintiff and Henry Lincoln, then husband and wife, separated about 1937. Plaintiff was then and ever since has been and now is a resident of California. March 2, 1937, Henry Lincoln obtained a divorce in Clark County, Nevada, from plaintiff. Subsequently, both parties remarried.

### III.

September 14, 1938, plaintiff and Henry Lincoln signed and acknowledged a property settlement agreement wherein, among other provisions, Henry Lincoln agreed to "pay Party of the Second Part, Gladys E. Lincoln, his wife, the sum of One Hundred Twenty-five Dollars (\$125.00) per month during the rest of his natural life, payable on the 15th



day of September, 1938," and "that the said parties hereto hereby accept the considerations moving to each of them under this agreement as a full and complete settlement of all property rights, and each party agrees to accept as a complete settlement of all of his or her right to alimony, maintenance, attorney's fees and costs," and "that this agreement is not made and shall not be construed as an agreement for or in aid of any divorce and that it is to remain in full force and effect whether the parties continue with the relation of husband and wife, or such relations may hereafter be dissolved for any cause whatever."

#### IV.

That the said Henry Linclon died testate on August 27, 1955, in Boise, Ada County, Idaho, being then resident therein. Pursuant to the provisions of the will leaving all his property to defendant, Elizabeth Lincoln, she was duly and regularly appointed executrix and due and regular notice thereof with publication of notice to creditors was made, the first publication of notice to creditors being September 29, 1955, and the last publication being October 20, 1955.

#### V.

December 29, 1955, Joseph Shane, attorney for the plaintiff, wrote the Clerk of the Probate Court of Ada County, State of Idaho, as follows:

"I recently learned that one Henry Lincoln died August 27, 1955, at Boise, Idaho, and that final services were held December 17, 1955, at Salt Lake

City, Utah. I desire to know if there are any probate proceedings presently pending in your county in connection with the estate of said deceased. I do not know whether or not he was a permanent resident of Boise at the time of his death. However, this inquiry is to get a starting point. If you do not find any such proceedings pending in your county, please advise me where to write where such statistical information is kept, assuming such probate proceedings were filed in some other county in the State of Idaho. If you find such proceedings pending in your county, please give me the name of the attorney, the number of the proceedings and title thereon and the person to whom a claim against the estate should be sent and also the appropriate creditors claim forms which are used in your jurisdiction. Thank you in advance for giving the matter your early attention."

## VI.

On January 3, 1956, Honorable John Jackson, Probate Judge of the Probate Court of Ada County, Idaho, replied thereto as follows:

"We are in receipt of your letter of December 29, 1955, regarding the above-named estate matter.

"Petition for Probate of the Will of this party was filed September 7, 1955, and on September 23, 1955, Elizabeth Lincoln was appointed Executrix and duly qualified on the same date.

"Karl Paine, Box 483, Boise, Idaho, is the attorney in this matter and claims may be sent to him."

## VII.

February 6, 1956, plaintiff's attorney, Joseph Shane of Los Angeles, California, wrote defendant as executrix of the will of Henry Lincoln, c/o Karl Paine, her attorney, Box 483, Boise, Idaho, that being the designated place for the presentation of claims, as follows:

“I enclose herein a Creditor's Claim on behalf of Gladys E. Lincoln Gramm, formerly Gladys E. Lincoln, in the sum of \$25,500.00, the same being duly executed and I have attached to said Creditor's Claim a photostatic copy of the property settlement agreement upon which said claim is based. I have the original of said agreement in my possession and if for some reason you desire to see it I shall be pleased to send it to you.

“My client, the former Mrs. Lincoln, has been and is now a resident of the County of Los Angeles, State of California, and has had no notice of the first publication of notice to creditors and only learned the latter part of December, 1955, that Mr. Lincoln had passed away. I do not know when the first publication of notice to creditors was made and, consequently, I am unable to determine if this creditor's claim is filed within time. If for some reason the same is to be rejected because of the time of presentation, please advise me thereof at once so that an affidavit by my client can be made and presented to the probate judge permitting the filing of this creditor's claim by reason of my client's

nonresidence in Idaho and lack of knowledge of publication of notice to creditors.

“Please accept my thanks in advance for your immediate reply to the matters stated herein.”

### VIII.

Plaintiff's claim as creditor was as follows and enclosed therewith:

“Moneys accruing and due Gladys E. Lincoln, Creditor, from Henry Lincoln, Deceased, under and pursuant to a certain property settlement agreement in writing dated September 14, 1938, at Los Angeles, California, a photostatic copy of the original thereof is attached hereto, made a part hereof as though herein set out in full. Under and pursuant to said contract there became due and payable for the period commencing September 15, 1938, to and including August 15, 1950, a period of 144 months, at \$125.00 per month, the sum of \$18,000.00 and for the period commencing September 15, 1950, to and including August 15, 1955, a period of 60 months at \$125.00 per month, the sum of \$7,500.00.

“Total Claim .....\$25,500.00

“The obligation under said contract was entered into in Los Angeles County, California, and payable therein and following execution of said contract the deceased left the State of California and affiant has no information that he ever returned to said State.”

(Creditor's Claim duly verified.)



## IX.

February 8, 1956, defendant filed her first and final account and petition for distribution of the estate which was duly and regularly noticed, and to which plaintiff filed no objections.

## X.

On February 9, 1956, Mr. Paine responded to the above last-mentioned letter as follows:

“Reference is made to your letter of February 6, 1956, addressed to Mrs. Elizabeth Lincoln, Executrix of the Estate of Henry Lincoln, deceased, enclosing a creditor’s claim against the said estate. Since you mailed the letter in my care it is hardly necessary to say that I am replying thereto as attorney for the estate.

“I note your inquiry. Disclaiming any intended discourtesy to you, either personally or professionally, I am constrained to say that I am in no position to supply the information you seek, or to aid or appear to aid you in the presentation or prosecution of this claim. On the other hand it is my present duty and earnest purpose to do all in my poor power to defeat the claim, which on its face is phony. Mrs. Lincoln has heard of “Connie,” and of the bad time she gave Mr. Lincoln in the long ago, but your letter is the first information she has had of this or any other claim of your client against Mr. Lincoln.

“Do not misunderstand me. This harsh characterization of the claim is not meant to strike at you

over your client's shoulders. I seek no personal quarrel with you. You may not know anything of the claim's history.

"Lastly, I note that the claim is divided into two parts, obviously because it is thought the first item may be outlawed. In my opinion it is outlawed. If your client will withdraw it, I will entertain an offer of compromise from you based on the second item. Lawsuits are costly."

## XI.

To which letter Mr. Shane, on February 15, 1956, replied as follows:

"Thank you for your letter of February 9, 1956, regarding the above matter.

"I note in your letter a suggestion that the claim lacks any merit. The agreement upon which the claim is based was prepared by Mr. Walter T. Casey, an attorney of excellent reputation in this area. Mr. Casey was acting as attorney for Mr. Lincoln at the time in question, and execution of the agreement by the parties before a notary public indicates at least that the parties undertook to bind themselves pursuant to the terms of the agreement. By obtaining execution of this agreement Mr. Lincoln obtained for himself such benefit and advantage that he desired and prevented Mrs. Lincoln from making or asserting any other claims or demands. The Creditors Claim filed in this matter seeks to recover the amounts which Mr. Lincoln failed to pay.



"I agree with your comment that 'Lawsuits are costly.' You suggest the possibility that this matter could be settled. Assuming that a portion of our claim is waived and confined only to the second portion of the claim, would the executrix be willing to pay \$7,500.00?

"I shall appreciate being advised thereon."

## XII.

Mr. Paine's response on February 17, 1956, being as follows:

"Your letter of February 15, 1956, was received this morning.

"I did not mean to intimate that the agreement was 'phony' ab initio, and neither did I suspect Mr. Casey's good faith.

"What I had in mind was that your client waited until Mr. Lincoln was dead, before attempting to enforce it. As I wrote to you, Mrs. Lincoln never heard of this claim until she received your letter. Naturally Mrs. Lincoln feels that Mr. Lincoln would have told her about the claim if he had not thought it had been satisfied. He told her circumstantially about his affairs many times, and he went into great details in explaining to me what might happen upon his death at the time I prepared his will, but he never said a word to me about this particular claim.

"If Mr. Lincoln had suggested to Mrs. Lincoln that he was indebted to your client, she would then

feel that she herself was under a moral obligation to Mrs. Gramm, but the fact is Mr. Lincoln led her to believe that he owed Mrs. Gramm nothing, hence Mrs. Lincoln's attitude is that the claim is at most a legal obligation which she is free to defeat if she can.

"In view of the situation as I have explained it to you, it is hardly necessary for me to say that Mrs. Lincoln rejects your suggestion of a compromise."

### XIII.

On February 17, 1956, the said Probate Court made and entered its decree of settlement of final account and final distribution distributing the said estate of Henry Lincoln, deceased, to defendant herein, his widow, in accordance with the will.

### XIV.

March 16, 1956, plaintiff petitioned the said Probate Court to set aside its said decree of distribution, detailing the above chronological sequence of events, on the ground that defendant had falsely represented to the court that all the debts of the said deceased and his estate had been fully paid and that her final account exhibited not only the debts that had been paid, but all claims that had been presented or allowed, whereas the account and petition for decree did not disclose the filing of plaintiff's creditor's claim. A general demurrer thereto, motion to strike and motion to overrule were interposed on the ground substantially that

plaintiff's claim had not been filed within time, that is within four months of the first publication of notice to creditors, and that plaintiff had not applied to the Probate Court to extend the time for presentation of claims to the executrix and for an order of said Probate Court extending time therefor.

### XV.

April 5, 1956, and after Decree of Distribution had been entered by the Probate Court, plaintiff petitioned for extension of time for filing her creditor's claim by reason of said plaintiff being out of the State and having had no actual notice, directly or indirectly, of notice to creditors in the estate herein involved, praying for an order of the court extending time for filing her creditor's claim presented February 17, 1956, and that defendant as executrix be ordered by the court to reject or allow, and act upon her claim and for such other relief as might seem meet. This petition was accompanied and supported by affidavits of plaintiff and her attorney, Joseph Shane, reiterating and augmenting her petition and statement that she was a non-resident of the State of Idaho and had no actual notice of the publication of notice to creditors or probate proceedings until the time she made out and presented her claim as detailed above. No counter showing was made.

### XVI.

April 11, 1956, Honorable John Jackson, Probate Judge of Ada County, Idaho, sustained defendant's demurrer, motion to overrule and motion to strike

plaintiff's petition to vacate the decree of distribution and denied plaintiff's motion for extension of time for presenting her claim.

### XVII.

Thereafter, plaintiff appealed to the District Court of the Third Judicial District of the State of Idaho, for Ada County, from the decree of settlement and distribution.

### XVIII.

Upon hearing in the District Court plaintiff introduced oral evidence in support of her position that she was a nonresident of the State of Idaho, and of the property settlement agreement, that she had no actual notice of the publication of the notice to creditors or of the pendency of the probate proceedings.

### XIX.

At the conclusion of the hearing the District Court stated:

“That the judgment of this court would be that the decree of settlement of first and final account and making distribution of the estate as made by the Probate Court is affirmed and the attempt to appeal from anything else is dismissed.”

and entered judgment substantially as follows:

“It is ordered and adjudged, and this does order and adjudge that the order and decree of the Probate Court of Ada County, Idaho, approving, allowing,

and settling the first and final account of respondent as executrix of the estate of Henry Lincoln, deceased, and making final distribution therein be and the same are hereby affirmed, and the appeal dismissed——”

## XX.

On appeal therefrom to the Supreme Court, on a record containing all of the above documents, records and proceedings, it rendered its decision May 31, 1957,

312 Pac. 2d 113

sustaining the actions of the Probate and District Courts on the ground that plaintiff had not filed her creditor's claim on time and the same was barred by the statute of limitations.

## XXI.

May 5, 1956, plaintiff filed this suit in the District Court of the United States for the District of Idaho, Southern Division, on pleadings and records therein being as the files and records of this court referred to and incorporated as such in this stipulation.

## XXII.

Each of the parties hereto reserves the right to object to the competency, relevancy, or materiality of any of the letters or documents herein above set out.

/s/ FRANK E. CHALFANT,

/s/ RAYMOND L. GIVENS,

Attorneys for Plaintiff.



/s/ KARL PAINE,

/s/ J. M. LEGGAT,

Attorneys for Defendant.

[Endorsed]: Filed August 16, 1957.

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[Title of District Court and Cause.]

### OPINION

Healy, Acting District Judge

It appears to me that the issue or issues in this case have been fully disposed of by the Supreme Court of Idaho in its opinion reported in *Gramm v. Lincoln*, 312 P. 2d at p. 113.

Plaintiff's motion for leave to file an amended complaint will be denied, and her action will be dismissed.

Let judgment be entered accordingly.

/s/ WILLIAM HEALY,

Acting District Judge.

[Endorsed]: Filed August 19, 1957.



In the District Court of the United States for the  
District of Idaho, Southern Division

Civil Action 3253

GLADYS E. LINCOLN GRAMM,

Plaintiff,

vs.

ELIZABETH LINCOLN, Executrix of the Last  
Will and Testament of Henry Lincoln, De-  
ceased,

Defendant.

### ORDER

The above cause came on regularly to be heard upon plaintiff's motion for leave to file her amended complaint, and defendant having filed objections thereto.

Defendant having heretofore, and by leave of this Court, filed a supplemental answer in which is set out the decision of the Supreme Court of Idaho in Gramm v. Lincoln (312 p. 2d 113), which said decision is final; and it appearing therefrom that the issue or issues in this action have been fully disposed of by the Supreme Court of Idaho.

Now, Therefore, It Is Ordered, Adjudged and Decreed, that plaintiff's motion for leave to file her amended complaint be, and the same is hereby, denied; that plaintiff's action be, and the same is hereby, dismissed with prejudice as of this date; and that the defendant have her costs, if any, incurred in this action.

Dated: August 27, 1957.

/s/ WILLIAM HEALY,  
U. S. District Judge.

[Endorsed]: Filed August 27, 1957.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Gladys E. Lincoln Gramm, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered denying leave to amend her complaint, dismissing the action with prejudice, and allowing costs, if any, to defendant, in this action on August 27, 1957.

/s/ FRANK E. CHALFANT, SR.,

/s/ RAYMOND L. GIVENS,  
Attorneys for Appellant,  
Gladys E. Lincoln Gramm.

[Endorsed]: Filed September 25, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DESIGNA-  
TION OF CONTENTS OF RECORD ON  
REVIEW

To the Clerk of the Court; and to the Above-En-  
titled Court:

Appellant hereby applies for an extension of  
thirty days within which to designate the contents  
of record on review.

/s/ FRANK E. CHALFANT, SR.,  
Attorney for Appellant.

ORDER

Upon reading and filing the above and foregoing  
petition for extension of time for designation of  
contents of record on review;

It Is Hereby Ordered that appellant may have  
thirty days extension of time to designate the rec-  
ord on review.

Dated: October 25th, 1957.

/s/ EDWARD P. MURPHY,  
U. S. District Judge.

[Endorsed]: Filed October 25, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY

Plaintiff-appellant herewith presents, by authority of statute and by virtue of the equity jurisdiction inherently vested in this Honorable Court, the following points upon which she intends to rely:

I.

The court erred in denying plaintiff's motion for leave to file her amended complaint, in denying the broad equity jurisdiction of this Honorable Court, and in dismissing plaintiff-appellant's complaint with prejudice.

II.

The court erred, since the Probate Court and District Court of Ada County, State of Idaho, were wholly without equity jurisdiction to try the case on its merits, in refusing to exercise that equity jurisdiction of this suit for specific performance of the agreement sued on, this court being the proper court to try this suit on its merits.

III.

The court erred, likewise, in denying the equity jurisdiction of the cause of action stated in the amended complaint whereby plaintiff-appellant seeks to hold defendant-appellee responsible for her unjust personal enrichment at the expense of plaintiff-appellant, for withholding from plaintiff-appellant the indispensable information as to the date

of first publication of notice to creditors when plaintiff-appellant specifically requested same and was entitled thereto under the Idaho Statute as a creditor outside the state who had not received the notice provided by the notice to creditors referred to in the said proviso, to Sec. 15-604 as Chapter 6, Title 15 of the Idaho Code.

#### IV.

That the court erred in denying the statutory right to trial on the merits since this suit was timely commenced under Sec. 15-609 Idaho Code, as a suit in equity.

#### V.

That the court erred when it failed and refused to recognize the equitable jurisdiction created through the probability that this plaintiff-appellant, as the former wife, does not necessarily have to present her claim at all, since there was no agreement but the one sued on, which agreement was made in consideration of the duty of support owed to her by the decedent.

#### VI.

That the court's rejection of plaintiff-appellant's claim herein and dismissal of her action was and is a denial of due process of law in violation of the Federal Constitution in that she did not have any notice of the time in which claims had to be filed, and she filed her claim prior to the decree of distribution and was arbitrarily denied recourse under and as provided by Sec. 15-604 Idaho Code.



## VII.

That the court erred in depriving plaintiff-appellant of all her remedies at law and in equity, by treating the Idaho Supreme Court decision as determinative of all issues, reference being hereby made to the order dated August 27, 1957, when that Honorable Court's opinion and decision merely denied plaintiff-appellant a plain, speedy and adequate remedy at law, and concerned only her right to present her claim after the time limitation stated in the notice to creditors had expired.

## VIII.

That the court erred in failing and refusing to hear on its merits the allegations of fraud contained in the complaint, and in the amended complaint.

## IX.

That the court erred in failing and refusing to consider the allegations of fact out of which plaintiff-appellant contends that a trust of the estate resulted upon the distribution of the estate by the Probate Court of Ada County, irrespective of plaintiff-appellant's claims, contrary to the dictates of justice.

/s/ FRANK E. CHALFANT, SR.,

/s/ RAYMOND L. GIVENS,

Attorneys for Plaintiff-  
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed November 13, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

May 5—Filed Complaint.

May 5—Issued Summons.

May 18—Filed Summons—unserved.

June 2—Filed Answer.

Aug. 20—Filed Motion to Require Plaintiff to  
Reply to Deft's. Answer.

Aug. 20—Filed Notice of Motion.

Sept. 5—Entered Order Granting Motion to Com-  
pel Plaintiff to Reply to Defendant's An-  
swer (Judge Clark).

Sept. 26—Filed Application for Order Enlarging  
Time.

Sept. 26—Filed Order Enlarging Time & Allowing  
20 days to Answer (Clark).

Oct. 12—Filed Plaintiff's Reply to Affirmative De-  
fense.

Oct. 15—Filed Motion for Summary Judgment.

Oct. 25—Record of Hearing; Motion for Summary  
Judgment taken under advisement, 10-5  
days for briefs (Clark).

Oct. 25—Filed Plaintiff's Brief.

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June 29—Filed Motion to File a Supplemental an-  
swer.

June 29—Filed Notice of Motion.

June 29—Filed Motion for Leave to File Supple-  
ment to Motion for Summary Judgment.

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June 29—Filed Notice of Motion.

July 19—Entered Order to join Raymond L. Givens as associate counsel for Plff.

July 23—Filed Motion to add Additional Party, etc.

July 23—Filed Notice of Motion.

July 23—Filed Amended Complaint.

Aug. 5—Filed Objections to Motion for Leave to File Amended Complaint.

Aug. 12—Filed Supplemental Answer.

Aug. 12—Entered Order Granting Motion to file Supplemental Answer and postponing ruling on Motion to File Amended Complaint; and setting pretrial hearing for Aug. 16, 1957, at 11 a.m. (Clark).

Aug. 16—Record of pretrial hearing (Healy).

Aug. 16—Lodge proposed Amended Complaint.

Aug. 16—Filed Pretrial Stipulation.

Aug. 19—Filed Opinion of Wm. Healy, Judge.

Aug. 19—Copies of Opinion sent to Frank E. Chalfant, Raymond L. Givens, Karl Paine and J. M. Leggat.

Aug. 23—Filed Acknowledgment of Service of proposed Order of Dismissal.

Aug. 27—Filed Order Denying Motion to file Amended Complaint, and Dismissing Action with Prejudice and with Deft's. Costs (Healy).

Aug. 27—Notice of Dismissal sent to Frank E. Chalfant, Sr., Karl Paine, J. M. Leggat, and Raymond L. Givens.

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Sept. 25—Filed Notice of Appeal—copy to J. M. Leggat.

Sept. 25—Filed Bond for Costs on Appeal.

Oct. 25—Filed Order Extending Time for Designation of contents of record—30 days extension (Judge Murphy).

Oct. 25—Copies of Order to Karl Paine and J. M. Leggat.

Nov. 4—Filed Designation of Contents of Record on Appeal.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Docket entries.
2. Complaint.
3. Answer.
4. Motion requiring plaintiff to reply to the answer of defendant to plaintiff's complaint.
5. Affidavit of Karl Paine re: reply to answer.
6. Order requiring plaintiff to answer affirmative defense (Minute entry of Sept. 5, 1956).

7. Reply to affirmative defense.
8. Motion for summary judgment.
9. Motion to file a supplemental answer.
10. Motion to add Elizabeth Lincoln as an individual heir and legatee.
11. Supplemental answer.
12. Order dated Aug. 12, 1957, by Judge Clark, granting motion to file supplemental answer.
13. Amended complaint lodged Aug. 16, 1956.
14. Pretrial stipulation.
15. Opinion of William Healy.
16. Order or judgment dated August 27, 1957.
17. Notice of Appeal.
18. Order extending time for designation of contents of record on review.
19. Designation of contents of record on review.
20. Statement of points upon which appellant intends to rely.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 15th day of November, 1957.

[Seal]

ED. M. BRYAN,  
Clerk.

By /s/ LORA MANSER,  
Deputy.



[Endorsed:] No. 15801. United States Court of Appeals for the Ninth Circuit. Gladys E. Lincoln Gramm, Appellant, vs. Elizabeth Lincoln, Executrix of the Last Will and Testament of Henry Lincoln, Deceased, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Idaho, Southern Division.

Filed: November 18, 1957.

Docketed: November 29, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

